92-1806

Supreme Court, U.S.
FILED
MAY 5 - 1993
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1992

CHARLES L. MEYER,
PLAINTIFF-APPELLANT PRO SE,
PETITIONER

VS.

JOHN LELSZ, ET AL.,
PLAINTIFFS-APPELLEES
JOHN J. KAVANAGH, ET AL.,
DEFENDANTS-APPELLEES,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Charles L. Meyer
Plaintiff-Appellant Pro Se
Petitioner
355 Pinewood Lane
San Antonio, Texas 78216
(210) 828-1913

QUESTIONS PRESENTED FOR REVIEW

1. Whether a U. S. Court of Appeals Fifth Circuit decision on the law of the case principle will be allowed to stand which conflicts with U. S. Courts of Appeal decisions on the same matter.

2. Whether a U. S. Court of Appeals Fifth Circuit decision on the law of the case principle will be allowed to stand which conflicts with a U. S. Supreme Court decision on the same matter.

LIST OF ALL PARTIES

Named Plaintiffs

John Lelsz, Jr., by and through his next friends, John Lelsz, Sr. and Ruth Lelsz.

Jean Gibson[1], by and through her next friend, Beryl Gibson.

Stoyan Sephus[1], by and through his next friend, Roxy Sephus.

Michael Huffman[1] (no current next friend designated)

Plaintiff Class

All persons who resided at Austin, Denton or Fort Worth State Schools after November 27, 1974 and all persons who have appeared on the Registry for State School Placement since 1981.

Defendants

The Texas Commissioner of Mental Health and Mental Retardation, Dennis Jones, the Deputy Commissioner for Mental Retardation

1. This party was represented by the Intervenor-Appellant Parent Association for the Retarded of Texas before the Fifth Circuit.

Services, Jaylon Fincannon, all Members of the Texas Board of Mental Health and Mental Retardation, and the Superintendents of Austin, Denton and Fort Worth State Schools.

Intervenors

Advocacy, Inc., Austin, Texas

Parent Association for the Retarded of Texas[2] (PART), Austin, Texas

Class Member Appellants

David Meyer, by and through his next friend Charles L. Meyer

Freda Snyder[1], by and through her next friends Fred and Ruth Snyder.

2. This Intervenor-Appellant before the Fifth Circuit declined to appeal the Fifth Circuit January 11, 1993 decision to Affirm. Refer to the Parent Association for the Retarded of Texas letter dated February 21, 1993 which was sent to the Petitioner. The Petitioner attached a copy of this letter to his Petitioner's designation of party believed to lack interest in outcome of petition which he filed on March 31, 1993.

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No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1992

CHARLES L. MEYER,

PLAINTIFF-APPELLANT PRO SE,

PETITIONER

VS.

JOHN LELSZ, ET AL.,

PLAINTIFFS-APPELLEES

JOHN J. KAVANAGH, ET AL.,

DEFENDANTS-APPELLEES,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT

OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Charles L. Meyer, Plaintiff-Appellant Pro Se, petitions for Writ of Certiorari to review the Fifth Circuit decision of January 11, 1993 which Affirmed the Trial Court Interlocutory Order dated December 30, 1991 which approved a second settlement agreement.

OPINIONS BELOW

The Trial Court Interlocutory Order dated December 30, 1991 is reported at 783 F. Supp. 286 (N. D. Tex., Dallas Div., 1991).

The January 11, 1993 Memorandum Opinion of the Fifth Circuit, whose judgment is herein sought to be reviewed, is not reported. This decision and the Fifth Circuit Order which denied the Petitioner's third petition for rehearing on February 4, 1993 are included in the Appendices to this Petition.

The Fifth Circuit previously held that the 1983 Settlement Agreement for the provisions requiring habitation in the least re-

strictive setting did not mandate community placements. The Fifth Circuit vacated the Trial Court decision and remanded. This decision is reported at 807 F. 2d 1243 (Fifth Cir., 1987). The Petitioner's third petition for rehearing filed with the Fifth Circuit on January 19, 1993 and denied on February 4, 1993 incorporated this 1987 Lelsz Fifth Circuit decision in his argument of the law of the case principle.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1993. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254 (1).

The jurisdiction of this case in the District Court was based upon 28 U. S. C. § § 1331 and 1343 (3) and (4).

STATEMENT OF THE CASE

On November 27, 1974 the Plaintiffs filed suit in the United States District

Court for the Eastern District of Texas to challenge the adequacy of conditions, care, and habitation of three of the thirteen of the Texas State Schools for the mentally retarded. In 1987 the case was certified under Rule 23 (b) (2) of the Federal Rules of Civil Procedure as a class action. The class at that time comprised approximately 2,400 residents of the Austin, Denton and Fort Worth State Schools for the mentally retarded. In 1991 the Plaintiff class numbered over 6,000 individuals. The case was transferred to the United States District Court for the Northern District of Texas Dallas Division on November 29, 1985.

In May, 1983 all of the parties signed a Resolution and Settlement Agreement which consists of 21 pages. The Trial Court approved this Resolution and Settlement Agreement by Court Order on July 19, 1983.

On August 14, 1991 three of the four existing parties presented a second Settlement

Agreement to the Trial Court. Joining in the second Settlement Agreement were the State, the Plaintiffs (as represented by class counsel, David Ferleger), and one of the two Intervenors, Advocacy, Incorporated. The other Intervenor, Parent Association for the Retarded of Texas (PART) did not join in the second Settlement Agreement. The Trial Court on September 13, 1991 preliminarily approved the second Settlement Agreement and ordered notice be given to class members pursuant to Rule 23 (e) of the Federal Rules of Civil Procedure. By terms of the notice, written objections were to be filed by November 4, 1991.

An ancillary part of the August, 1991 Settlement Agreement was the enactment of the 1991 Texas General Laws 15 by the Texas Legislature. This legislation granted authority contingent upon Trial Court approval of the August, 1991 Settlement Agreement. This legislation created an Advisory Board

to advise Governor Ann Richards with the recommendation to close two of the 13 state schools for the mentally retarded. The Governor's Advisory Board recommended that Mexia and Travis State Schools be closed as part of the settlement of the Trial Court class action. Governor Richards rejected the closure recommendation for Mexia State School and asked the Advisory Board to recommend the closure of Fort Worth State School. Fort Worth State School is one of the three state schools which is one of the three original parties to the Trial Court class action. Governor Richards accepted the Advisory Board's recommendation to close Fort Worth and Travis State Schools.

The Petitioner is a member of the Austin, TX State School Parents Association. The Petitioner was kept generally informed of the status of the Trial Court class action by attending meetings of this organization. The Petitioner did not become personally involved

until after the Texas Department of Mental Health Mental Retardation submitted a second settlement agreement to the Trial Court in August, 1991. This second settlement agreement filed with the Trial Court contains the provision that the State of Texas shall close two of the 13 state schools for the mentally retarded. The Petitioner's son David is a resident of Austin, TX State School. The Petitioner became interested in the Trial Court class action because Governor Richards of Texas has stated publically that she intended to close Austin, TX State School.

The Petitioner filed his written objections to the proposed second settlement to the Trial Court on October 12, 1991. The Petitioner's basic written objection was that there had been a previous Resolution and Settlement Agreement in May, 1983 which was approved by Trial Court Order in July, 1983 and the previous settlement comprised the legal issue of the finality of a settlement agree-

ment. The Trial Court held a hearing on November 25--26, 1991 to consider the written objections to the Defendant's proposed second settlement. On December 30, 1991 the Trial Court issued a 34 page Memorandum Opinion and Order which approved the second settlement settlement which was submitted in August, 1991.

Two individuals, counsel for PART and Charles L. Meyer, a member of the Plaintiff class who proceeded Pro Se, filed separate written notices of appeal of the Trial Court's Interlocutory Order dated December 30, 1991 to the U. S. Court of Appeals Fifth Circuit. Two different Docket nos. were combined into one formal appeal by motion of the counsel of PART which the Fifth Circuit granted. Docket no. 91-7033 pertains only to PART. Docket no. 92-1087 was assigned to both Charles L. Meyer, Plaintiff-Appellant Pro Se and PART, Intervenor-Appellant. Oral argument was held before the Fifth Circuit

on January 5, 1993. The Fifth Circuit issued a memorandum Order on January 11, 1993 which Affirmed the December 30, 1991 Trial Court Interlocutory Order which approved the August, 1991 second settlement agreement. On January 19, 1993 the Petitioner filed his third petition for rehearing. The legal argument presented therein was that the law of the case principle precluded the Trial Court from accepting a second settlement agreement to settle the Trial Court class action. The Fifth Circuit denied the Petitioner's third petition for rehearing on February 4, 1993.

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS IN THE LAW OF THE CASE PRINCIPLE BETWEEN THE DIFFERENT COURTS OF APPEAL.

The Appellant's formal appeal brief filed with the Fifth Circuit on July 23, 1992 at pages 12--14 argued the law of the case principle with its two applications to a trial court and to an appeals court. The Ap-

pellant cited the following citations for the law of the case principle which applies to a trial court: Van Gemert v. Boeing Co., 590 F. 2d 433, 436--437 (Second Cir., 1978), certiorari granted 99 S. Ct. 2158, 441 U. S. 942, 60 L. Ed. 2d 1043 (1979), affirmed 100 S. Ct. 745, 444 U. S. 472, 62 L. Ed. 2d 676 (1980); Moore v. Jas. H. Mathews and Co., 682 F. 2d 830, 833 (Ninth Cir., 1982) and all of the cases cited therein. The Appellant's arguments cited for application of the law of the case principle with application to an appeals court Moore and Pettway v. American Cast Iron Pipe Co., 576 F. 2d 1157, 1180--1190 (Fifth Cir., 1978) and all of the cases cited therein.

The Petitioner submits that portions of the Resolution and Settlement Agreement dated May, 1983 and the Trial Court Order dated July 21, 1983 which accepted this Resolution and Settlement agreement warrant the application of the law of the case principle. Excerpts

of those two documents have been included in the Petitioner's Appendices. Refer to Page 3 Paragraph 5. at Appendix B page 2. The Petitioner submits that this provision precludes the Defendant-Appellee from introducing the August, 1991 Settlement Agreement which attempts to abrogate the May, 1983 Resolution and Settlement Agreement. Refer to Page 4 Paragraph 6. b. at Appendix B page 2. Refer to Page 6 paragraph II. (4) at Appendix B page 3. Refer to Page 41 Paragraph V. at Appendix B pages 3 and 4. The citation at Appendix B page 2 at Paragraph 6. (b). is implicit that Austin, Denton, and Fort Worth State Schools shall remain open for use and shall not be closed. The law of the case principle applies to this issue and permits these three state schools to continue in existence.

The Petitioner submits that the law of the case principle applies to a decision of a coordinate court in the same case as much as to a court's own decisions. The Appellant

argued this principle in his third petition for rehearing which he filed with the Fifth Circuit on January 19, 1993 based upon the court reporter citation of Christianson v. Colt Industries Operating Corp., 108 S. Ct. 2166, 2177 at Paragraph [10] (1988), 486 U. S. 800, 100 L. Ed. 2d 811, on remand 870 F. 2d 1292 (Seventh Cir., 1989), certiorari denied 101 S. Ct. 81 (1989), 107 L. Ed. 2d 47. Further, Christianson at Page 2177 Paragraph [9] contains the following guidance. ". . . 'As most commonly defined, the doctrine [of the law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.' Arizona v. California, 460 U. S. 605, 618, 103 S. Ct. 1382, 1391, 75 L. Ed. 2d 318 (1983) (dictum). This rule promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.' 1B J. Moore, J. Lucas, & T. Cur-

rier, Moore's Federal Practice ¶ 0.404[1], page 118 (1984) (hereinafter Moore's)."

The Petitioner cites Lelsz v. Kavanagh, 807 F. 2d 1243 (Fifth Cir., 1987). This decision is an appeal of the Trial Court approval of a motion submitted by counsel of the Plaintiff class dated February, 1985 which provided for 279 class members to be transferred to community centers. This motion was based upon the Resolution and Settlement Agreement which was approved by the Trial Court Order dated July 21, 1983. Id. at Pages 1245 and 1246. At Page 1255 the Fifth Circuit concluded that the District Court was without jurisdiction to enforce the Resolution and Settlement Agreement or remedy any violation thereof by ordering the State to make community placements of class members. The Fifth Circuit vacated the Trial Court Order dated June 5, 1985 for community placements and remanded for further proceedings. The Petitioner submits that the 1987 Lelsz

Fifth Circuit decision precludes the State from making community placements under the provisions of the 1983 Resolution and Settlement Agreement. The Petitioner further submits that a Court of Appeals must ordinarily follow a previous decision of such court, absent subsequent change in substantive law. This Federal common law principle is based upon the court reporter citation of State of Cal. Dept. of Health Services, 853 F. 2d 634, 638 (Ninth Cir., 1988) Paragraphs [1, 2] which in turn cite Royal Dev. Co. v. NLRB, 703 F. 2d 634, 638 (Ninth Cir., 1983) and Smith v. United States Postal Serv., 766 F. 2d 205, 207 (Sixth Cir., 1985). The Petitioner also cites a recent Fifth Circuit decision for this same Federal common law principle. "Under 'law of the circuit' rule, one panel of the Court of Appeals for the Fifth Circuit may not overrule the decision, right or wrong, of a prior panel. . . ." Brown v. U. S., 890 F. 2d 1329, 1336 (Fifth Cir.,

1989).

A Panel of Court of Appeals must follow decision of prior panels. Trunkline Gas Co. v. Federal Energy Regulatory Commission, 608 F. 2d 582 (Fifth Cir., 1979).

A Panel of the circuit is not at liberty to alter law of the circuit until the Supreme Court or the en banc circuit court so instructs. U. S. v. Albert, 675 F. 2d 712 (Fifth Cir., 1982).

In Fifth Circuit, one panel cannot overrule another; absent en banc reconsideration, court follows prior circuit decisions. Howard v. Gonzales, 658 F. 2d 352 (Fifth Cir., 1981).

Apparent conflict between decision which was subject of petition and decisions of courts of appeals for other circuits inpelled Supreme Court to grant certiorari. N. L. R. B. v. Metropolitan Life Ins. Co., 85 S. Ct. 1061, 1062, 1063, 380 U. S. 438, 13 L. Ed. 2d 951 (1965). The judgment of the Court of Ap-

peals was vacated and the case remanded with instructions. Id., 85 S. Ct. at 1065.

II.

THE FIFTH CIRCUIT DECISION CONFLICTS WITH THE LAW OF THE CASE PRINCIPLE BASED UPON THE 1988 U. S. SUPREME COURT CHRISTIANSON DECISION.

". . . An inferior court is bound by the mandate of the superior one, and must carry its directions into execution." Sibbold v. United States, 37 U. S. (12 Pet.) 488, 9 L. Ed. 1167 (1838), Briggs v. Pennsylvania R. Co., 334 U. S. 304, 306, 68 S. Ct. 1039, 92 L. Ed. 1403 (1948).

Federal District Courts and Courts of Appeal are bound to adhere to the controlling decisions of the U. S. Supreme Court. This Federal common law principle is expounded at Hutto v. Davis, 454 U. S. 370, 375, 102 S. Ct. 703, 705--706, 70 L. Ed. 2d 566 (1982) and Stell v. Savannah-Chatham County Board of Education, 333 F. 2d 55, 61 (Fifth Cir., 1984), cert. denied, 379 U. S. 933, 85 S. Ct. 332,

13 L. Ed. 2d 344 (1984).

Apparent conflict between decision and Supreme Court's holdings in another case impelled that court to grant certiorari. Heflin v. U. S., 79 S. Ct. 451, 452, 358 U. S. 415, 3 L. Ed. 2d 407 (1959). The Supreme Court reversed at Heflin, 79 S. Ct. 454.

United States Supreme Court granted certiorari where there was an alleged conflict between the determination made by the Court of Appeals and earlier decision of the Supreme Court. Pennsylvania R. Co. v. O'Rouke, 73 S. Ct. 302, 303, 344 U. S. 334, 97 L. Ed. 367 (1953), rehearing denied 73 S. Ct. 638, 345 U. S. 913, 97 L. Ed. 1347 (1953). The Supreme Court reversed at Pennsylvania, 73 S. Ct. at page 306.

CONCLUSION

WHEREFORE, the Petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

Charles L. Meyer
Plaintiff-Appellant Pro Se
Petitioner
355 Pinewood Lane
San Antonio, Texas 78216
(210) 828-1913

CERTIFICATE OF SERVICE

On the fifth day of May, 1993, a true and correct copy of the Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was placed in the United States Mail, Certified, return receipt requested and served upon the following named individual pursuant to Supreme Court Rule Nos. 12.1 and 29.1

Mr. William K. Suter
Court Clerk
U. S. Supreme Court
1 First Street, NE
Washington, D. C. 20543

Three copies of this petition for Writ of Certiorari have also been mailed to the Counsels of the different parties to this petion pursuant to Supreme Court Rule No. 29.3 as follows:

Mr. David Ferleger, Esquire
37 South 20th Street, Suite 601

Philadelphia, Pennsylvania 19103

Ms. Dona Hamilton, Esquire
Texas Office of the
Attorney General
General Litigation Division
Box 12548 Capitol Station
Austin, Texas 78711

Mr. Paul Coggins, Esquire
Meadows, Owens, Collier,
Reed and Coggins
3700 NCNB Plaza
901 Main Street
Dallas, Texas 75202

Mr. Garth Corbett, Esquire
Ms. Diane Shisk, Esquire
Advocacy, Inc.
7800 Shoal Creek Boulevard,
Suite 171-E
Austin, Texas 78757

Charles L. Meyer

Plaintiff-Appellant Pro Se

Petitioner

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-7033

JOHN LELSZ, et al.,
Plaintiffs-Appellees,

ADVOCACY, INC.,
Intervening
Plaintiff-Appellee,

VS.

JOHN J. KAVANAGH, M. D., et al.,
Defendants-Appellees,

VS.

PARENT ASSOCIATION FOR THE
RETARDED OF TEXAS,

Intervenor-Appellant.

No. 92-1087

JOHN LELSZ, et al.,
Plaintiffs,

JOHN LELSZ, et al.,
Plaintiffs-Appellees,

VS.

CHARLES L. MEYER,
A Member of the Plaintiff Class,
Plaintiff-Appellant,

VS.

ADVOCACY, INC.,
Intervening Plaintiff-Appellee,

VS.

JOHN L. KAVANAGH, M.D., Etc., et al.,

VS.

PARENT ASSOCIATION FOR THE
RETARDED OF TEXAS
and FREDA SNYDER,
By and Through Her Next Friends and Guardians
Fred and Ruth Snyder,
Intervenors-Appellants.

Appeals from the United States
District Court for the
Northern District of Texas
(CA3-85-2462-H)

Before REAVLEY, SMITH and EMILIO M. GARZA,

Circuit Judges. PER CURIAM:*

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

In no. 91-7033, the appeal is DISMISSED,

as the appellant has not listed the propriety of the September 4, 1991, order as an issue on appeal, nor does it provide any reasons, in the brief, as to why the order was inappropriate. Accordingly, the issue is waived. See Atwood v. Union Carbide Corp., 847 F. 2d 278, 280 (5th Cir.) (per curiam), opinion on rehearing, 850 F. 2d 1093 (5th Cir. 1988) (per curiam), cert. denied, 489 U.S. 1079 (1989).

In No. 92-1087, the judgment is AFFIRMED. We have reviewed the briefs, the record, and the argument of counsel and conclude that the district court did not abuse its discretion in approving the settlement.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1087

D.C. Docket no. CA3-85-2462-H

JOHN LELSZ, ET AL.,
Pliantiffs,

JOHN LELSZ, ET AL.,
Plaintiffs-Appellees,

V.

CHARLES L. MEYER,
a member of the Plaintiff class,
Plaintiff-Appellant,

V.

ADVOCACY, INC.,
Intervening Plaintiff-Appellee,

V.

JOHN J. KAVANAGH, M.D., ET AL.,
Defendants-Appellees,

V.

PARENT ASSOCIATION FOR THE
RETARDED OF TEXAS and FREDY SNYDER,
by and through her next friends and
guardians Fred and Ruth Snyder,
Intervenors-Appellants.

Appeals from the United States District
Court for the Northern District of Texas

Before REAVLEY, SMITH, and EMILIO M. GARZA, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal in this cause is affirmed.

IT IS FURTHER ORDERED that appellants pay to appellees the costs on appeal to be taxed by the Clerk of this Court.

January 11, 1993

ISSUED AS MANDATE: February 17, 1993

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1087

JOHN LELSZ, ET AL.,
Plaintiffs,

JOHN LELSZ, ET AL.,
Plaintiffs-Appellees,

V.

CHARLES L. MEYER, a member of the
Plaintiff class,
Plaintiff-Appellant,

V.

ADVOCACY, INC.,
Intervening Plaintiff-Appellee,

V.

JOHN J. KAVANAGH, M.D., Etc., ET AL.,
Defendants-Appellees,

V.

PARENT ASSOCIATION FOR THE
RETARDED OF TEXAS AND FREDA SNYDER,
by and through her next friends and
guardians Fred and Ruth Snyder,
Intervenors-Appellants.

Appeals from the United States District Court
for the Northern District of Texas

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ON PETITION FOR REHEARING

(February 4, 1993)

Before REAVLEY, SMITH, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/S/ J. Smith
United States Circuit Judge

REHG-4

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

JOHN LELSZ, et. al., individually and on behalf of all others similarly situated, Plaintiffs	:	
V.	:	CIVIL ACTION NO. S-74-95-CA
JOHN J. KAVANAGH, M.D., et.al., Defendants	:	

RESOLUTION AND SETTLEMENT

. . .

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. . .

4. Jurisdiction is conferred on this Court by 28 U.S.C. 1331 and 1343(3) and (4). This action for declaratory and injunctive relief is authorized by 42 U.S.C. 1983 and 1988, the United States Constitution, 28 U.S.C. 2201 and 2202, and Rule 57 of the Federal Rules of Civil procedure. This Court has jurisdiction of the subject matter of this action and of all parties in the case. The Court

has the authority to approve and implement the relief in this Resolution and Settlement and any plans pursuant thereto.

5. These provisions include a final resolution of the defendants' obligations towards the members of the plaintiff class and of the issues raised by this litigation. . . .

. . .

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6.

. . .

b. This Resolution and Settlement applies to residents who currently or in the future reside in, or who will after the execution of this Resolution and Settlement have resided in, Austin State School, Denton State School, and Fort Worth State School or any facility operated by the three state schools and to those other members of the plaintiff class who come forward and request services.

. . .

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DIVISION OF TEXAS
SHERMAN DIVISION

JOHN LELSZ, et. al., individually and on behalf of all others similarly situated	)	
V.	)	No. S-74-95-CA
JOHN J. KAVANAGH, M.D., et al.	)	

ORDER AND MEMORANDUM OPINION

. . .

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. . .

II.

. . .

(4) . . . The settlement does not close any of the three institutions.

. . .

-41-

. . .

V.

. . .

Both plaintiffs and defendants have ex-

pressed their willingness to abide by the settlement terms . . .

. . .

ORDERED that the proposed Resolution and Settlement shall be, and it is hereby, APPROVED.

SIGNED and ENTERED this 19th day of July, 1983.

/S/ Wm. Wayne Justice

Chief Judge

(2)

Supreme Court, U.S.
FILED
JUL 13 1993
OFFICE OF THE CLERK

No. 92-1806

****

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

****

PETITION OF CHARLES L. MEYER,
Petitioner,

JOHN LELSZ, ET AL,
Respondents

v.

JOHN J. KAVANAGH, M.D., ET AL,
Respondents

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

****

BRIEF IN OPPOSITION BY STATE RESPONDENTS

****

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QUESTIONS PRESENTED

1. Whether one who was not a party to the proceedings below has standing to request review of the unanimous decision of the Court of Appeals?

2. Whether one who is not aggrieved by a judgment has standing to request review of the unanimous decision of the Court of Appeals approving the judgment?

3. Whether one who asserts the rights of third parties rather than his own has standing to request review of the unanimous decision of the Court of Appeals?

4. Whether the unanimous decision of the Court of Appeals decision upholding a settlement agreement among the parties is consistent with the law of the case and legal precedent?

LIST OF ALL PARTIES

Named Plaintiffs

John Lelsz, Jr., by and through his next friends, John Lelsz, Sr. and Ruth Lelsz.

Jean Gibson, by and through her next friend, Beryl Gibson.

Stoyan Sephus, by and through his next friend, Roxy Sephus.

Michael Huffman.

Plaintiff Class

All residents of the Austin, Denton or Fort Worth State Schools, or former residents since November 27, 1974 and all persons who have appeared on the Registry for State School Placement since 1981.

Defendants

The Texas Commissioner of Mental Health and Mental Retardation, Dennis Jones, the Deputy Commissioner for Mental Retardation Services, Jaylon Fincannon, all members of the Texas Board of Mental Health Retardation, and the Superintendents of Austin, Denton and Fort Worth State Schools.

Intervenors

Advocacy, Inc.

Parent Association for the retarded of Texas

LIST OF ALL PARTIES - Continued

Petitioner

Charles L. Meyer (not a party in the District Court)[1]

[1] Although not a party in the District Court, Meyer, who is the father of one of the small number of class members who objected to the settlement, filed an appeal to the Fifth Circuit Court of Appeals. The Fifth Circuit's affirmance of the settlement approval is the subject of Meyer's certiorari petition. No party in the court below has joined this certiorari request.

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NO. 92-1806

****

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

****

PETITION OF CHARLES L. MEYER,
Petitioner,

JOHN LELSZ, ET AL,
Respondents

v.

JOHN J. KAVANAGH, M.D., ET AL,
Respondents

****

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

****

STATEMENT OF JURISDICTION

This Court does not have jurisdiction over this case. Meyer did not intervene in District Court until after the decision of the Court of Appeals, which he asks this Court to review, and he lacks standing here.

STATEMENT OF THE CASE

This class action lawsuit has litigated, over the course of its nineteen-year existence, issues concerning the care and treatment of persons with mental retardation in the Texas state schools. The class certified by the District Court consists of all residents of the Austin, Denton, and Fort Worth State Schools, former residents since 1974, and all people who have been on the Registry for State School Placement since 1981. The class numbers approximately 5,700 members. The original defendants, officials

representing the Department of Mental Health and Mental Retardation of the State of Texas, were eventually joined by intervenor Parent Association of the Retarded of Texas ("PART"). Charles L. Meyer is a member of PART. Advocacy, Inc. intervened on behalf of the plaintiff class.

In 1983 the parties entered into a consent decree known as the Resolution and Settlement to resolve the litigation, which was approved by the District Court. There was substantial disagreement among the parties about the implementation of the R&S, resulting in a motion by plaintiff's counsel to require defendants to place hundreds of individuals into community settings. The Court of Appeals overruled the District Court's granting of that motion. Lelsz v. Kavanagh, 807 F.2d 1243 (5th Cir. 1987), *reh'g denied* 815 F.2d 1034 (5th Cir. 1987). While the R&S was later clarified by an Implementation Agreement signed by all parties, including PART, disagreement over the application of the R&S continued.

In 1991 the most recent agreement was reached among the state defendants, the plaintiff class, and intervenor Advocacy, Inc.; this settlement was opposed by intervenor PART. The settlement provided for the closure of two state schools and the placement of six hundred individuals with mental retardation in the community. The District Court for the Northern District of Texas approved the settlement agreement on December 30, 1991. 783 F.Supp. 286 (N.D. Tex. 1991). PART appealed the District Court's approval of the settlement to the Fifth Circuit Court of Appeals, which upheld the settlement and issued an order on January 11, 1993. Meyer individually, as well as PART, filed a Notice of Appeal and various briefs on the substantive issue, as well as a long list of motions on assorted topics (a list of the pleadings filed by Meyer, as they appear on the docket of the Court of Appeals, is attached as Appendix A).

On March 29, 1993 Meyer filed a *pro se* motion to intervene in the District Court case "in order to assert a motion for sanctions against the counsel for the Plaintiff class for unprofessional conduct." The District Court denied the Motion to Intervene as untimely on March 30, 1993. Meyer did not appeal this determination. Instead, he filed the petition for certiorari to which this brief responds.

REASONS WHY THE PETITION SHOULD BE DENIED

ARGUMENT

I. CHARLES L. MEYER WAS NOT A PARTY TO THE PROCEEDINGS BELOW, AND LACKS STANDING TO REQUEST REVIEW OF THE DECISION OF THE COURT OF APPEALS

Charles Meyer has never been a party to these proceedings. While he is an individual member of an intervening group, the Parent Association for the Retarded of Texas ("PART"), his motion to intervene as an individual was denied by the District Court on March 30, 1993 (subsequent to the decision of the Court of Appeals which he asks this Court to review). Meyer did not appeal this ruling of the District Court.

Only parties to a lawsuit have standing to appeal. United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977). A recent case before this Court involved an attempt by individuals who were not parties to the underlying lawsuit to appeal from a consent decree approving that lawsuit's settlement. Marino v. Ortiz, 484 U.S. 301 (1988). The Court held that the non-parties lacked standing to appeal. The better practice is for such a nonparty to seek intervention for purposes of appeal; the denials of such motions are of course appealable. 484 U.S. 301, 304. Since Meyer failed to appeal the denial of his motion to intervene, his petition to this Court for certiorari should be denied for lack of standing.

The appellants in Walker v. City of Mesquite, 858 F.2d 1071 (5th Cir. 1988) were members of a certified class, but not named plaintiffs. Like Charles Meyer, they filed a *pro se* notice of appeal from the District Court's approval of a consent decree, even though their motion to intervene had been denied by the District Court. Since appellants had not appealed the denial of the motion to intervene, the Fifth Circuit held that they were constrained to dismiss the appeal for want of jurisdiction. 858 F.2d 1071, 1074.

Meyer's remedy, if his interests were not adequately represented by the intervention of PART, was to intervene in the District Court prior to the appeal. Meyer actually moved to intervene after the decision of the Court of Appeals, and the District Court denied this motion. Meyer did not appeal the ruling of the District Court denying his request to intervene in this case. Having failed to so, he lacks standing to request review of the decision of the Court of Appeals in this case.

II. CHARLES L. MEYER IS NOT A PARTY AGGRIEVED BY THE JUDGMENT HE ASKS THIS COURT TO REVIEW

Meyer objects to the refusal by the Court of Appeals to set aside the District Court's approval of a settlement agreement which provides for the closure of two of the existing thirteen Texas institutions for persons with mental retardation. As Meyer asserts in his petition for certiorari, the schools chosen for closure are the Travis State School and the Fort Worth State School. Meyer also asserts that his son resides at the Austin State School. Meyer claims that he is still concerned, however, because "the governor has stated publicly that the Austin State School will be closed."

To have standing a party must have an immediate and pecuniary interest, not a contingent interest. United States v. Little Joe Trawlers, Inc., 780 F.2d 158 (1st Cir. 1986). Meyer has not shown that the opinion of the Court of Appeals, approving a settlement which will result in closure

of the Travis and Fort Worth State Schools, will affect him or his son in any way.

III. THE RIGHTS WHICH MEYER ASSERTS ARE THE RIGHTS OF THIRD PARTIES RATHER THAN HIS OWN

Since Charles Meyer's son is a resident of a state school which is not slated for closure, the rights which Meyer attempts to assert belong (if they exist at all) to residents of the state schools which are in the process of closing. Meyer has no standing to assert such rights.

This Court recently addressed this issue in Bender v. Williamsport School Dist., 475 U.S. 534 (1986). Students who had been denied a school meeting place for their religious club sued the school district, members of the school board, the superintendent of schools, and the principal. The District Court granted the students' motion for summary judgment, and the school board began permitting students to hold their meetings. Bender, an individual school board member, appealed the District Court's order. This Court held that he lacked standing. The opinion states that Bender could not appeal in his individual capacity because the record did not disclose that relief was sought or given on that basis. On the other hand, Bender could not appeal in his official capacity because standing on that basis belonged only to the school board of which he was a member. Bender then attempted to claim standing on the basis that his child attended the school. This Court held, however, that this basis for standing should have been asserted in the District Court. A party may not add to the record in the Appellate Court to confer standing that does not appear from the trial record.

Similarly, Meyer here attempts to assert rights belonging to the PART group of which he is a member, and attaches in support of his argument a letter from PART stating that the group does not intend to appear. Meyer

lacks standing to request this Court's review of the decision of the Court of Appeals.

IV. THE RULING OF THE COURT OF APPEALS IS CONSISTENT WITH PRECEDENT AND WITH THE LAW OF THE CASE

Meyer's argument appears to focus on the holding of the Fifth Circuit concerning an order purporting to enforce one of the earlier settlement agreements in this case. Lelsz v. Kavanagh, 807 F.2d 1243 (5th Cir. 1987), *reh'g denied* 815 F.2d 1034 (5th Cir. 1987). Plaintiffs had filed a motion with the District Court requesting the immediate placement of hundreds of class members into community settings, to effectuate R&S language which established guidelines for the treatment of the mentally retarded. Defendants argued that this ruling would discriminate unfairly against non-class-members who were equally eligible for community placement. The District Court ordered such placements and the Court of Appeals overruled on the basis of this Court's opinion in Pennhurst State School v. Halderman, 465 U.S. 89 (1984). The Court of Appeals held that since the mentally retarded have no federal constitutional right to community placement, the District Court exceeded its authority by this interpretation of the R&S.

Meyer appears to argue that this ruling is "law of the case" requiring the Court of Appeals to overturn the District Court's approval of the latest settlement agreement in this case. There is no relationship between these concepts. The parties subsequently agreed, in 1991, to close two of the Texas state schools, and to concurrently place a number of individuals with mental retardation in community placements. No issue of the District Court's jurisdiction is raised by the approval of this agreement among the parties. The authorities cited by Meyer are simply inapplicable here.

CONCLUSION

Respondent respectfully requests that this Court deny Petitioner's Writ of Certiorari to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

Lelsz v. Kavanagh (5th Circuit Court of Appeals)
Some of the Motions filed by Charles Meyer[2]

91-7033 - from Docket Sheet

3/17/92	Motion of Appellant Meyer in 92-1087 for correction of typing errors in responsive brief filed on 2/12/92. (Granted - SV - 3/17/92).
9/17/92	Appellant's motion for sanctions against counsel for the Intervenor-Appellee Advocacy, Inc., et al. (Also filed in 92-1087).
9/17/92	Appellant's motion to quash the Intervenor Advocacy's brief filed 9/9/92. (Also filed in 92-1087).
9/23/92	Motion of Appellant Meyer for correction of typing error in his motion to quash filed on 9/15/92. (Also filed in 92-1087).
9/23/92	Motion of Appellant Meyer to quash the brief of Appellee Texas Dept. of Mental Health Mental Retardation which was served on him on 9/14/92. (Also filed in 92-1087).
9/28/92	Motion of Appellant Meyer to quash the Appellee's brief which was served on him on 9/21/92. (Also filed in 92-1087).

[2] Several motions were filed after judgment and returned by the Clerk unfiled. The correspondence to those matters is not listed here.

10/2/92 Motion of Appellant Meyer to quash the Appellee's brief which was filed on 9/10/92 and subsequently served on him on 9/23/92. (Also filed in 92-1087).

10/14/92 Motion of Appellant Meyer to quash the brief of Appellee Advocacy, Inc. which was served on him on 10/5/92. (Also filed in 92-1087).

10/26/92 Motion of Appellant Meyer for Reconsideration of that portion of the Court's Order of 10/16/92 which denied the motions to quash the briefs of different Appellees. (Also filed in 92-1087).

11/16/92 Appellant Meyer's second petition for rehearing in response to the Court's Order dated 11/2/92. (Also filed in 92-1087).

11/23/92 Appellant's third motion for correction of typing errors in his petition for rehearing which was filed on 10/24/92. (Also filed in 92-1087). (Unopposed motion granted - SV - 12/1/92).

11/23/92 Appellant's fourth motion for correction of typing errors in his second petition for rehearing which was filed on 11/14/92. (Also filed in 92-1087). (Unopposed motion granted - SV - 12/1/92).

12/2/92 Appellant Meyer's motion to quash the Appellee Advocacy, Inc.'s response brief which was filed on 11/25/92. (Also filed in 91-1087).

92-1087 -- from Docket Sheet

9/17/92 Appellant's motion for sanctions against counsel for Intervenor-Appellee Advocacy, Inc., et al. (Also filed in 91-7033).

9/17/92	Appellant's motion to quash the Intervenor Advocacy's brief filed on 9/9/92. (Also filed in 91-7033).
9/23/92	Motion of Appellant Meyer for correction of typing error in his motion to quash filed on 9/15/92. (Also filed in 91-7033).
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9/28/92	Motion of Appellant Meyer to quash the Appellee's brief which was served on him on 9/21/92. (Also filed in 91-7033).
10/2/92	Motion of Appellant Meyer to quash the Appellee's brief which was filed on 9/10/92 and subsequently served on him on 9/23/92. (Also filed in 91-7033).
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10/14/92	Motion of Appellant Meyer to quash the brief of Appellee Advocacy, Inc. which was served on him on 10/5/92. (Also filed in 91-7033).
11/16/92	Appellant Meyer's second petition for rehearing in response to the Court's Order dated 11/2/92. (Also filed in 91-7033).
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11/23/92	Appellant's fourth motion for correction of typing errors in his second petition for rehearing which was filed on 11/14/92. (Also filed in 91-7033). (Unopposed motion granted - SV - 12/1/92).
12/2/92	Appellant Meyer's motion to quash the Appellee Advocacy, Inc.'s response brief which was filed on 11/25/92. (Also filed in 91-7033).
12/31/92	Letter from Appellant Meyer dated 12/24/92 advising of corrections of typing errors in his brief and giving an errata to his brief.
3/03/93	Motion of Appellant Meyer for leave to file 2 pleadings out of time.

Supreme Court, U.S.
FILED
JUL 6 1993
OFFICE OF THE CLERK

No. 92-1806

In The

Supreme Court of the United States

October Term, 1992

PETITION OF CHARLES L. MEYER,

Petitioner,

JOHN LELSZ, JR., *ET AL.*,

Respondents.

v.

JOHN J. KAVANAGH, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION BY RESPONDENTS JOHN LELSZ, JR. AND ADVOCACY, INC.

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QUESTIONS PRESENTED

1. Where all the multiple parties to an 18 year old systemic class action have either settled their differences or decided not to seek further review, does an individual non-party parent of a class member have standing to seek review of the settlement approval?

2. Does the unpublished unanimous Court of Appeals decision conflict with any decision by the Supreme Court?

3. Does the Court of Appeals decision conflict with any decision of any Court of Appeals?

LIST OF ALL PARTIES

Named Plaintiffs

John Lelsz, Jr., by and through his next friends, John Lelsz, Sr. and Ruth Lelsz.

Jean Gibson, by and through her next friend, Beryl Gibson.

Stoyan Sephus, by and through his next friend, Roxy Sephus.

Michael Huffman.

Plaintiff Class

All persons who resided at Austin, Denton or Fort Worth State Schools on or after November 27, 1974 and all persons who have appeared on the Registry for State School Placement since 1981.

Defendants

The Texas Commissioner of Mental Health and Mental Retardation, Dennis Jones, the Deputy Commissioner for Mental Retardation Services, Jaylon Fincannon, all members of the Texas Board of Mental Health Retardation, and the Superintendents of Austin, Denton and Fort Worth State Schools.

Intervenors

Advocacy, Inc.

Parent Association for the Retarded of Texas

LIST OF ALL PARTIES – Continued

Petitioner

Charles L. Meyer (not a party in the District Court)[1]

---

[1] Although not a party in the District Court, Meyer, who is the father of one of the small number of class members who objected to the settlement, filed an appeal to the Fifth Circuit Court of Appeals. The Fifth Circuit's affirmance of the settlement approval is the subject of Meyer's certiorari petition. No party in the court below has joined this certiorari request.

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No. 92-1806

In The

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October Term, 1992

PETITION OF CHARLES L. MEYER,

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JOHN LELSZ, JR., *ET AL.*,

Respondents.

v.

JOHN J. KAVANAGH, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION BY RESPONDENTS JOHN LELSZ, JR. AND ADVOCACY, INC.

STATEMENT OF JURISDICTION

This Court does not have jurisdiction over this case. Meyer was not a party in District Court, did not intervene for purposes of appeal to the Court of Appeals, and is not properly before this Court. The petition presents no justiciable Article III case or controversy. See discussion below at Section I.

STATEMENT OF THE CASE

All parties and intervenors settled their differences after 18 years of litigation. Raising irrelevant issues that were not addressed by either of the courts below, the father of one class member seeks review by certiorari even though he has no standing, and even though there is no conflict with any Circuit or any decision by the Supreme Court.

Filed in 1974, this civil rights class action challenged the adequacy of care at certain Texas state schools for people with retardation, alleged their inherent harmfulness, and requested that they be ordered closed and replaced with community services. *Lelsz v. Kavanagh*, 783 F. Supp. 286, 287 (N.D. Tex. 1991). Although school closures were among the requests, the class action's objective was to improve and ensure constitutional guarantees to adequate care. The class now has 5,683 members who are, or were since 1974, residents at Fort Worth, Austin or Denton state schools.

In 1983, on the eve of the trial, Plaintiffs and Defendants came to an agreement called the Resolution and Settlement ("R&S"). The R&S established a general right to community services and to institutional improvements. After the R&S was signed, two parties joined as intervenors with regard to implementation of the judgment: Advocacy, Inc.,[2] the federally funded agency mandated to represent the interests of people with developmental disabilities, which generally supported the Plaintiff class,

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[2] The Plaintiff class and Advocacy Inc. have filed this Brief in Opposition.

and Parent Association for the Retarded of Texas ("PART"), which generally supported the Defendants.

The Fifth Circuit reversed later orders for community placements. *Lelsz v. Kavanagh,* 807 F.2d 1243 (5th Cir. 1987). The Defendants' failure to comply with other portions of the settlement led to the State Defendants being held in contempt of court. *Lelsz v. Kavanagh,* 673 F. Supp. 828, 831 (N.D. Tex. 1987). Shortly thereafter, the parties signed the second settlement, the Implementation Agreement ("IA"), to delineate compliance standards under the R&S.

Although it opposed the R&S in 1983, PART signed the IA whose primary purpose was not to amend or replace, but rather clarify the R&S. *Id.* at 876.

Since 1987, the State and the Plaintiffs have had numerous disagreements over compliance with the IA. A third agreement, the Settlement Agreement ("SA"), was reached August 9, 1991 and approved by the District Court.

The history of the case is recited in detail in the settlement approval decision which is at issue here. That opinion also examines the settlement and the objections submitted in response to it. *See Lelsz v. Kavanagh,* 783 F. Supp. 286 (N.D. Tex. 1991). Before the court approved the IA, a fairness hearing had been held at which the court received and considered objections by a small portion of the class, as well as extensive evidence in support of the settlement. Approximately 370 objections were received from persons on behalf of class members, which represented about 6.5 percent of the class. Thus, nearly 93.5

percent of the 5,683 class members did not object to the SA.

The Petitioner, Charles L. Meyer had not participated in this litigation for the first 18 years of its pendency, and his first action was his *pro se* objection to the SA. Meyer presented no evidence or argument with regard to his objection; he did not make his presence known or speak in court at the settlement approval hearing. Significantly, except for his unusual argument that the 1983 settlement must forever remain in force, Meyer's objections to the settlement echoed those made by PART and its witnesses, all of which objections were considered by the District Court.

The District Court found that the SA would provide a number of important benefits to the class. Among the benefits, the SA would provide the Plaintiffs with two of the central goals from the original complaint: closure of state schools and creation of improved, more intimate community placements. *Lelsz*, 783 F. Supp. at 290.

Other benefits include independent neglect and abuse review, a simpler appeals process for placement decisions, and maintenance of quality standards in the community. *Id.* As the District Court pointed out, "the State had learned to analyze the quality of its programs and services more critically." *Id.* at 295. Furthermore, those shortcomings that remain in the state schools are almost certain not to improve further under the IA. *Id.* at 296.

Meyer, along with PART, appealed to the Fifth Circuit. The appeals were consolidated, and the judgment

approving the settlement was affirmed, with the Court of Appeals finding no abuse of discretion.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Petitioner does not have standing to seek review of the settlement approval because he is a non-party parent of a class member and the class has joined all other parties in approving the settlement.

Petitioner Charles L. Meyer had not participated in this litigation for the first 18 years of its pendency. His first action was his *pro se* objection to the 1991 settlement, one objection among the very small number received by the trial court. He did not present any testimony or evidence, or even speak on the record at the settlement approval hearing. In addition, Meyer did not move to intervene for the purposes of appeal.

The rule is "well settled" that objectors to a settlement who are not named class representatives may not appeal approval of the settlement, unless they are parties to the original suit or have intervened for the purpose of appeal. *Marino v. Ortiz*, 484 U.S. 301, 304 (1988).

There is no conflict among the circuits on this settled rule. The Fifth, Seventh, Eighth, and Eleventh Circuits all agree. *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988) (nonnamed members of certified plaintiff class lack standing to challenge consent decree that district court has ordered approving settlement between all named parties); *In re VMS Ltd. Partnership Sec. Litig.*, 976 F.2d 362 (7th Cir. 1992) (allowing unnamed class member to

directly appeal post-settlement order implementing settlement agreement would wholly thwart the purpose of class action); *Croyden Assoc. v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992) (unnamed class member could not appeal even though it objected to settlement agreement, where it failed to intervene); *Jenkins v. State of Missouri*, 967 F.2d 1245 (8th Cir. 1992) (school desegregation settlement included property tax raise; nonparty non-intervenor property owners had no standing to appeal); *Shores v. Sklar*, 844 F.2d 1485 (11th Cir. 1988) (unnamed class member has no standing to appeal final judgment when named plaintiff does not appeal); *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987) (inmate who was nonnamed class member does not have standing to appeal final judgment rendered in an inmate class action).[3]

Meyer is a parent of a nonnamed class member who did not move to intervene at any point in the case's litigation. Of the parties, only PART appealed to the Fifth Circuit, but PART did not file a writ of certiorari after the Fifth Circuit held that the District Court did not abuse its discretion in approving the settlement.

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[3] In *Guthrie*, the court held that there are three reasons why a nonnamed class member does not have standing to appeal a final judgment binding on their class members: such individuals cannot represent the class absent the procedures provided for in Rule 23 of the Federal Rules of Civil Procedure; class members who disagree with a course of class action have available adequate procedures through which their individual interests can be protected; and class actions could become unmanageable and non-productive if each member could individually decided to appeal. *Id.* at 628.

Meyer was not a party in District Court, did not intervene for purposes of appeal to the Court of Appeals, and is not properly before this Court. The petition presents no justiciable Article III case or controversy. Meyer has no standing to seek certiorari in this Court; he had no standing in the Court below.[4]

II. The unpublished unanimous court of appeals decision does not conflict with any Supreme Court decision.

Although Meyer cites *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988)[5] in the title of his argument, he does not cite *Christianson* or any other Supreme Court case regarding the law of the case conflict in his argument. Meyer only cites cases which explain this Court's power to grant writs of certiorari and the lower courts' duty to obey the superior courts.

Meyer is challenging the third and final settlement agreement which was signed and approved by all named

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[4] Here, the Fifth Circuit had no occasion to address the standing issue since Meyer's *pro se* appeal raised issues entirely without merit; to the extent he had general objections to the settlement, the Circuit addressed them in finding that the District Court had not abused its discretion in its detailed and considered decision approving the parties' decision to end the litigation.

[5] In *Christianson*, the law of the case issue was whether the Federal or Seventh Circuit had first decided the issue over jurisdiction. *Id.* at 817.

parties.[6] In an agreement objected by only 6.5 percent of the class, Meyer is making an unprecedented argument that the courts do not have authority to alter a consent decree. The law of the case principle, on which Meyer relies, does not preclude the Fifth Circuit from approving the SA agreed upon by all the named parties.

The law of the case doctrine promotes finality and efficiency in the adjudication of a case, and as a result, precludes a court from reexamining an issue previously decided. *Van Gemert v. Boeing Co.*, 590 F.2d 433, 436-37 n.9 (2d Cir. 1978), *aff'd*, 444 U.S. 472 (1980). The law of the case doctrine does not pertain to revision of consent decrees. A District Court is permitted to exercise flexibility in considering requests to modify consent decrees when it is no longer equitable for a judgment to have prospective application. *Rufo v. Inmates of Suffolk Jail*, 112 S. Ct. 748, 760 (1992). Although the courts have accepted previous agreements between the named parties, the law of the case doctrine would not treat those agreements as dispositive.

Also, this conflict argument was never addressed by the Fifth Circuit. Hence, there is no conflict with any Supreme Court decision.

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[6] The three signatories for the SA are the Plaintiff class, Defendants, and Intervenor Advocacy Inc. Although PART was opposed to the SA, it did not file a writ of certiorari.

III. The court of appeals decision does not conflict with any decision of any court of appeals.

Although Meyer cites numerous Court of Appeal cases which restate the law of the case doctrine, these cases, however, do not pertain to consent decrees approved by all named parties. Instead, they concern situations where, for example, a lower court decides to not follow the higher court after remand. *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830 (9th Cir. 1982).

Moreover, because this conflict argument was never addressed by the Fifth Circuit, there is no conflict with any decision of any Court of Appeals.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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